

1 The Honorable Robert S. Lasnik
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UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON

Phimpa Thepvongsa,

Case No. 2:2010-cv-01045

Plaintiff Pro Se,

**REPLY TO PLAINTIFF'S
RESPONSE & OBJECTION TO
RULE 12 MOTION**

v.

[Fed. R. Civ. P. 12(b)(6)]

Regional Trustee Services, Old
Republic Title LTD., Ocwen Loan
Servicing, LLC, Saxon Mortgage
Services, Mortgage Electronic
Registration Systems, Inc., Deutsche
Bank National Trust Company, Morgan
Stanley ABS Capital I Inc., and Doe
Defendants 1 through 20,

NOTE ON MOTION CALENDAR:
October 1, 2010

Defendants.

Ocwen Loan Servicing, LLC and MERS'
Reply to Plaintiff's Response & Objection
to Rule 12 Motion

Robert W. Norman, Jr. (SBN 37094)
Houser & Allison, APC
9970 Research Drive
Irvine, CA92618
PH: (949) 679-1111
FAX: (949) 679-1112

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28 Robert W. Norman, Jr. (SBN 37094)
Houser & Allison, APC
9970 Research Drive
Irvine, CA92618
PH: (949) 679-1111
FAX: (949) 679-1112

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Robert W. Norman, Jr. (SBN 37094)
Houser & Allison, APC
9970 Research Drive
Irvine, CA92618
PH: (949) 679-1111
FAX: (949) 679-1112

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Robert W. Norman, Jr. (SBN 37094)
Houser & Allison, APC
9970 Research Drive
Irvine, CA92618
PH: (949) 679-1111
FAX: (949) 679-1112

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Houser & Allison, APC
9970 Research Drive
Irvine, CA92618
PH: (949) 679-1111
FAX: (949) 679-1112

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INTRODUCTION

2 Plaintiff, Phimpa Thepvongsa's "Response & Objection to Rule 12 Motion"
 3 ("Opposition") provides duplicitous arguments for the same baseless allegations he
 4 originally claimed in his Complaint. Plaintiff continues to assert nine causes of
 5 action against defendants, each of which fails to adequately allege facts to support
 6 a claim or support any wrongdoing on the part of Defendants Ocwen Loan
 7 Servicing, LLC ("Ocwen"); Deutsche Bank National Trust Company, As Trustee
 8 ("Deustche Bank"); and Mortgage Electronic Registration Systems, Inc. ("MERS")
 9 (collectively "Defendants").

10 Each of the Plaintiff's claims are either legally meritless, factually
 11 unsupported, and/or fail to satisfy minimal notice pleading standards pursuant to
 12 Federal Rules 8(a). As a result, Plaintiff has failed to state any claim against
 13 Defendants, and Plaintiff's Complaint should be dismissed in its entirety, with
 14 prejudice. Leave to amend any of Plaintiff's claims would be futile as Plaintiff is
 15 unable to plead the requisite facts to state any of his claims.

16

ARGUMENT

A. It Remains that Plaintiff's Complaint Fails to State a Claim Upon Which Relief May Be Granted

20 Plaintiff's Opposition misquotes and incorrectly applies caselaw in his
 21 arguments against Defendants' Motion to Dismiss. For example, he argues that his
 22 pleadings are sufficient to entitle him to discovery and misapplies *Haynes v.*
 23 *Kerner*, 404 U.S. 519, 92 S.Ct. 594 (1972). He misquotes it as stating, "Regardless

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28 Robert W. Norman, Jr. (SBN 37094)
 29 Houser & Allison, APC
 30 9970 Research Drive
 31 Irvine, CA92618
 32 PH: (949) 679-1111
 33 FAX: (949) 679-1112

1 of Deficiencies in the pleading, pro se litigants are entitled to the opportunity to
 2 submit evidence in support of their claims.” (Opposition 1:20-24). However, that
 3 is not the language of the case. Instead, the *Haynes* Court found that plaintiff’s
 4 claims in that case were sufficient to call for the opportunity to offer supporting
 5 evidence. That is, he pled sufficient facts to support the allegations in his
 6 complaint. As discussed in Defendants’ Motion to Dismiss and further below,
 7 Plaintiff fails to a factual basis to support any of his claims.

8 Similarly, Plaintiff misconstrues *Anastasoff v. United States*. 223 F.3d 898
 9 (8th Cir.2000), an IRS case which dealt with the issue of whether parties may cite
 10 to an unpublished opinion as precedent where circumstances in the unpublished
 11 opinion were similar to the plaintiff’s case. Here, Plaintiff neither cites an
 12 unpublished opinion in his Complaint nor seeks relief from the Court for failure to
 13 recognize that his case is similar to another case which resulted in an unpublished
 14 opinion. (See Complaint).

15 Despite Plaintiff’s efforts to distract the Court, Plaintiff fails to show he is
 16 entitled to leave to amend. He continues to put forth no legal or factual support for
 17 any of his allegations.

18 **B. All Of Plaintiff’s Fraud Claims Are Not Pled With The Requisite**
 19 **Particularity And Specificity**

20 **1. Plaintiff Fails To Meet The Heightened Pleading Requirements For**
 21 **A Fraud Claim**

22 Plaintiff pleads that Defendants fraudulently induced Plaintiff to execute the
 23 Promissory Note and Deed of Trust. To establish a claim for fraud, Plaintiff must

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28
 Robert W. Norman, Jr. (SBN 37094)
 Houser & Allison, APC
 9970 Research Drive
 Irvine, CA92618
 PH: (949) 679-1111
 FAX: (949) 679-1112

1 allege: (1) representation of an existing fact; (2) materiality; (3) falsity; (4) the
 2 speaker's knowledge of its falsity; (5) intent of the speaker that it should be acted
 3 upon by the plaintiff; (6) plaintiff's ignorance of its falsity; (7) plaintiff's reliance
 4 on the truth of the representation; (8) plaintiff's right to rely on it; and (9) damages
 5 suffered by the plaintiff. *Stiley v. Block*, 130 Wn.2d 486, 504 (1996). Claims for
 6 fraud must be pled with particularity. C.R. 9.

7 Plaintiff does not allege any of the nine required elements for fraud. Rather,
 8 he states that "Plaintiff specifically pleads that Defendant(s) after fraudulently
 9 inducing Plaintiff to execute the Promissory Note & Deed of Trust failed to
 10 provide notice as required by the Real Estate Settlement Procedures Act & Truth in
 11 Lending Act..." (Opposition 2:12-18). Nowhere in Plaintiff's Complaint does he
 12 allege that Defendants made any representations that were material or false to
 13 Plaintiff. There are no facts which allege that the person purportedly making such
 14 representations knew that the representations were false and made them with the
 15 intent for Plaintiff to rely on them. Plaintiff also does not allege anywhere in his
 16 Complaint that he relied on Plaintiff's representations to his detriment. (*See*
 17 Complaint). Accordingly, Plaintiff has not pled the requisite facts for a claim of
 18 fraud and this claim must be dismissed.

19 Plaintiff also provides the text for R.C.W. 19.144.080 and R.C.W. 62A.3-
 20 305(a)(iii) regarding fraudulent misrepresentations (Complaint at Paragraphs 3 and
 21 5). However, he fails state which, if any, Defendants violated the statute and fails
 22 to provide specific factual allegations related to Defendants alleged violation.

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28
 Robert W. Norman, Jr. (SBN 37094)
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 9970 Research Drive
 Irvine, CA92618
 PH: (949) 679-1111
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1 **C. It Remains That There are No Factual Allegations That Give Rise**
 2 **to a RESPA Claim**

3 Plaintiff's Opposition prefers not to address the required elements for a
 4 RESPA claim while citing various violations of it. He fails to provide the required
 5 factual support as required under the law to give notice to Defendants as to the
 6 claim alleged against them. *See Delino v. Platinum Community Bank*, 628
 7 F.Supp.2d 1226, 1232 (S.D.Cal. 2009); Fed. R. Civ. P. 8(a).

8 As stated in Defendants' Motion to Dismiss, RESPA § 2605 generally
 9 provides that "each servicer of any federally related mortgage loan shall notify the
 10 borrower in writing of any assignment, sale, or transfer of the servicing of the loan
 11 to any other person...." 12 U.S.C. § 2605(b)(1) (West 2010). A plaintiff fails to
 12 state a claim pursuant to section 2605 unless facts are alleged demonstrating:
 13 "when any such alleged transfer took place, what entities were involved in such
 14 transfer and therefore had the duty to notify...." *Delino v. Platinum Community*
 15 *Bank*, 628 F.Supp.2d 1226, at 1232. It remains that there are no such allegations
 16 or facts demonstrating Defendants violated RESPA. As a result, Plaintiff has not
 17 satisfied minimal notice pleading requirements and has therefore failed to state a
 18 claim for RESPA violations. Plaintiff's claim must also be dismissed on this basis.

19 In addition, Plaintiff also claims that Defendants violated RESPA by
 20 charging exorbitant fees in the following ways:

- 21 (a) "over-charging Plaintiff with fees that were in violation of the limitations
 22 imposed by the Real Estate Settlement Procedures Act as said fees were
 23 simply contrived and not paid to a third party vendor;
- 24 (b) charging other fees that were a normal part of doing business and should
 25 have been included in the finance charge;

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Robert W. Norman, Jr. (SBN 37094)
 Houser & Allison, APC
 9970 Research Drive
 Irvine, CA92618
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- (c) Omitting additional real “parties of interest” to the transaction;
- (d) Misrepresenting the roles, authorities, and rights of parties the Plaintiff was made aware of. Plaintiff further suspects additional violations, however is currently ignorant of them due to Defendant(s) failure to timely and adequately respond to Defendant(s) [sic] correspondence.” (Opposition 3:6-15); *see also* (Opposition 12-14).

Plaintiff does not provide the sections of RESPA that Defendants violated, or who violated which section, but each of his allegations are conclusory and must fail as a matter of law.

D. Plaintiff's Complaint Fails To State Truth In Lending Act Claim

1. Defendant OCWEN is Exempt From TILA Liability Because It is Not The Original Creditor Or Assignee Of That Creditor

Plaintiff's Truth In Lending Act ("TILA") claims fail as a matter of law. TILA governs disclosure requirements to be given to a borrower by the original lender at the time the mortgage is issued. The only parties who can be liable for TILA violations are the original creditor, 15 U.S.C. § 1640, and assignees of that creditor, 15 U.S.C. § 1641. Moreover, TILA specifically exempts loan servicers, like Defendant OCWEN, from its provisions:

“(1) A **servicer** of a consumer obligation arising from a consumer credit transaction **shall not be treated as an assignee** of such obligation for purposes of this section **unless the servicer is or was the owner of the obligation.** (2) A servicer of a consumer obligation arising from a consumer credit transaction shall not be treated as the owner of the obligation for purposes of this section on the basis of an assignment of the obligation

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Houser & Allison, APC
9970 Research Drive
Irvine, CA 92618
PH: (949) 679-1111
FAX: (949) 679-1112

1 from the creditor or another assignee to the servicer
 2 solely for the administrative convenience of the servicer
 3 in servicing the obligation" (emphasis added). 15 U.S.C.
 4 § 1641 (f).

5 Plaintiff does not and cannot allege that Defendant OCWEN originated the
 6 loan because it is the loan servicer. As such, Defendant OCWEN, as a loan
 7 servicer, and Defendants Deutsche Bank and MERS, as the Beneficiary and former
 8 Beneficiary respectively, are not subject to the requirements of the statute and
 Plaintiff's claim for TILA violations must be dismissed with prejudice.

9

10 **2. Plaintiff's TILA Claim Against MERS and Deutsche Bank**
Fails Because Plaintiff Does Not Allege a TILA Violation
and Assignee Liability is Unavailable

11

12 Plaintiff's allegation that Defendants violated the Truth in Lending Act
 13 ("TILA") fails as a matter of law.

14 a. Plaintiff's fail to meet notice pleading standards as
to their TILA claim.

15 Plaintiff's TILA claim falls far short of notice pleading requirements, as
 16 they do not even allege who is alleged to have violated TILA. It is unclear
 17 whether Plaintiff is seeking to hold the Beneficiary DEUTSCHE BANK, or the
 18 Beneficiary MERS as liable. This robs DEUTSCHE BANK and MERS of the
 19 "fair notice of what the ... claim is and the grounds upon which it rests." *Conley*,
 20 355 U.S. at 47. Accordingly, Plaintiffs' TILA claim should be dismissed, as
 21 Plaintiff has not alleged facts providing notice of what the TILA claim is vis-à-vis
 22 DEUTSCHE BANK as Beneficiary or MERS as Beneficiary. *See* Fed.R.Civ.P
 23

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 29 Houser & Allison, APC
 30 9970 Research Drive
 31 Irvine, CA92618
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1 Rule 8(a)(2); *see also Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545, 127 S.
 2 Ct. 1955, 1964-65 (2007); *Conley*, 355 U.S. at 47.

3 b. To the extent that Plaintiff pursues assignee
 4 liability, Plaintiff Complaint fails to allege how
 5 the violation is apparent on the face of the
disclosure statement.

6 A debtor's right to pursue a TILA claim against an assignee is limited,
 7 however, by a "prerequisite []," which states that:

8 "[e]xcept as otherwise specifically provided in this
 9 subchapter, any civil action for a violation of this
 10 subchapter ... which may be brought against a creditor
 11 may be maintained against any assignee of such creditor
 12 only if the violation for which such action or proceeding
 13 is brought is apparent on the face of the disclosure
 14 statement, except where the assignment was
 15 involuntary."

16 15 U.S.C. § 1641(a).

17 This provision has been interpreted as meaning that a TILA claim may be
 18 asserted against an assignee only for "violations that a reasonable person can spot
 19 on the face of the disclosure statement or other assigned documents." *Taylor v.*
20 Quality Hyundai, Inc., 150 F.3d 689, 694 (7th Cir.1998). Plaintiff fails to allege
 21 how the TILA violation committed by the loan originators is apparent on the face
 22 of the assigned documents. *See Fonua v. First Allied Funding*, 2009 WL 816291,
 23 *2-3 (N.D.Cal. March 27, 2009) (dismissing TILA claim against assignee because
 24 Complaint failed to allege how the TILA violation committed by the loan

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28 Robert W. Norman, Jr. (SBN 37094)
 29 Houser & Allison, APC
 30 9970 Research Drive
 31 Irvine, CA92618
 32 PH: (949) 679-1111
 33 FAX: (949) 679-1112

1 originators is apparent on the face of the assigned documents). Accordingly,
 2 Plaintiff's TILA claim should be dismissed with prejudice.

3 **E. Plaintiff's Opposition Fails to Redeem His Breach of Fiduciary Duty**
 4 **Claim**

5 Plaintiff states that he need not prove a "special circumstance" to show that
 6 Defendants have breached their purported fiduciary duties to him and cites *Cox v.*
 7 *Helenius*, 103 Wash.2d 383 (1985) as authoritative. However, he fails to provide
 8 the requisite facts showing that the analysis also applies to his case. For example,
 9 he quotes the fiduciary duty of the trustee in *Cox* to be "exceedingly high" but fails
 10 to show how, in his case, the trustee's "exceedingly high duty" is similarly owed to
 11 Plaintiff. Moreover, the trustee in *Cox* foreclosed on the property despite notice of
 12 a pending action regarding a title dispute. Here, Plaintiff's complaint is premature
 13 at best because there has been no foreclosure of Plaintiff's property, let alone a title
 14 dispute.

15 Plaintiff also states that Defendants violated the Mortgage Broker Practices
 16 Act and provides the definition of a "mortgage broker," but fails to provide facts
 17 showing that Defendants qualified as mortgage brokers or, for purposes of the
 18 Mortgage Broker Practices Act, how Defendants and Plaintiff entered into a
 19 fiduciary relationship and then breached their duty. As such, plaintiff fails to state
 20 a claim for breach of fiduciary duty.

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28 Robert W. Norman, Jr. (SBN 37094)
 29 Houser & Allison, APC
 30 9970 Research Drive
 31 Irvine, CA92618
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1 **F. Plaintiff Again Fails To Allege Facts To State A Claim Pursuant To the**
 2 **Fair Credit Reporting Act**

3 As previously stated, to state a claim for violation of the Fair Credit
 4 Reporting Act (“FCRA”), “a consumer who disputes furnished credit information
 5 is required to follow a procedure set out in the FCRA which begins with notifying
 6 the credit reporting agency directly of the dispute. 15 U.S.C. § 1681i. *Tuazon v.*
 7 *HSBC Mortg. Services, Inc.*, 2007 WL 1960619, *2 (W.D.Wash.) (emphasis
 8 added).

9 While the Plaintiff recites the text of the relevant section of the statute, there
 10 are still no specific factual allegations related to Defendants’ alleged violations
 11 included therein. (Opposition 5:11-20). Most critical, however, is the repeated
 12 failure by Plaintiff to include any allegation that he notified the credit-reporting
 13 agency, which action is a prerequisite to maintaining a claim pursuant to the
 14 FCRA. *See Tuazon*, 2007 WL 1960619, *2. Accordingly, Plaintiff’s FCRA claim
 15 must also be dismissed.

16 **G. Express Language Exists in the Deed of Trust that Allows for MERS to**
 17 **Act**

18 In response to Defendants’ argument that MERS may act as the nominee
 19 beneficiary, Plaintiff responds that MERS is not the owner of the Promissory
 20 Note and MERS, or its assigns, are not entitled to collect upon Plaintiff’s
 21 default. As a preliminary matter, this argument is premature at best because
 22 there has been no foreclosure of Plaintiff’s property. Moreover, the language in
 23 the deed of trust is contrary to Plaintiff’s claim:

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Robert W. Norman, Jr. (SBN 37094)
 Houser & Allison, APC
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 PH: (949) 679-1111
 FAX: (949) 679-1112

1 “Borrower understands and agrees that ... if necessary to
 2 comply with law or custom, MERS, (as nominee for
 3 Lender and Lender’s successors and assigns), has the
 4 right to exercise any or all of those interests, including
 5 but not limited to, the right to foreclose and sell the
Property...” (See Exhibit “A” of Plaintiff’s
 Complaint) [Emphasis added].

6 Defendants are confused at the proposition of Plaintiff’s arguments. It is
 7 baffling to Defendants how Plaintiff can put language in an opposition that argues
 8 that MERS, or DEUTSCHE BANK, have no right as the beneficiary to invoke
 9 power of sale when the language is plain to see. Moreover many cases provide
 10 that the beneficiary, who is nominated by the lender, may invoke the power of sale.
 11 *Gunsul v. Countrywide Home Loans, Inc.*, 136 Wash.App.1013 (Wash.App.Div.
 12 2006); *Gaitan v. MERS*, 09-1009 (C.D. Cal. 2009) (finding that MERS has the
 13 right to initiate foreclosure proceedings and found that MERS is not liable for
 14 claims including wrongful foreclosure, breach of contract, and breach of the
 15 implied covenants of good faith and fair dealing); *Swanson v. EMC Mortgage*
 16 *Corporation*, 1:09cv1507 (E.D. Cal., 2009) (holding that MERS is properly
 17 designated as the beneficiary under a deed of trust and has the authority to
 18 commence non-judicial foreclosures); *Martinez v. Mortgage Electronic*
 19 *Registration Systems, Inc.*, PC043598 (Los Angeles County Superior Court, 2009)
 20 (affirming the holding in *Cencil* and that MERS has the authority to commence
 21 non-judicial foreclosures).

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Robert W. Norman, Jr. (SBN 37094)
 Houser & Allison, APC
 9970 Research Drive
 Irvine, CA92618
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1 **1. The Walker Case is Inapplicable**

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3 Plaintiff cites *In re: Walker*, Case No. 10-21656-E-11 (E.D.CA. May 20,
 4 2010) as applicable to his case. However, it is not. First, it was decided in a
 5 bankruptcy court. Second, the issues dealt with are not the same. In *Walker*, the
 6 court found that MERS could not transfer the promissory note to CitiBank
 7 because it was only a nominee for the lender. In that case, the bankruptcy court
 8 was deciding on a proof of claim in the bankruptcy context where a claimant had
 9 been assigned an interest from MERS. However, *Walker* did not analyze the
 10 legitimacy of MERS to initiate non-judicial foreclosure sales. Plaintiff still fails
 11 to address the copious amounts of case law on the subject that hold that MERS
 12 has authority to initiate non-judicial foreclosure where the deed of trust allows
 13 such. A court invalidating an assignment from MERS to a subsequent assignee
 14 is not the same as saying MERS does not have authority to initiate foreclosure
 under the terms of the deed of trust.

15 Plaintiff relies upon the same meritless theory as discussed regarding
 16 MERS' status as the contractually designated nominal beneficiary. As
 17 explained above, this theory is without support in law, and therefore cannot
 18 support the Plaintiff's slander claim. Accordingly, this claim should be
 19 dismissed for failure to state a claim under the law.

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 Houser & Allison, APC
 9970 Research Drive
 Irvine, CA92618
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1 **H. Plaintiff Fails To Plead Each of the Required Elements to State a Claim**
 2 **for Slander of Title**

3 Plaintiff merely includes the recorded documents in an attempt to
 4 substantiate his claim that Defendants slandered title to his real property. (See
 5 Complaint). But again, Plaintiff fails to provide the requisite factual allegations to
 6 support his claim. To state a cause of action for slander of title, a plaintiff must
 7 allege facts to establish: (1) false words; (2) maliciously published; (3) with
 8 reference to some pending sale or purchase of property; (4) which go to defeat
 9 plaintiff's title; and (5) result in plaintiff's pecuniary loss." *See Rorvig v. Douglas*,
 10 123 Wash.2d 854, 859 (1994). There is no factual basis for this claim.

11 **I. Plaintiff Fails To Plead Sufficient Facts to State a Claim for Violation of**
 12 **the Washington Consumer Protection Act, RCW §19.86, et. seq.**

13 Plaintiff's argument that Defendants violated Washington's Consumer
 14 Protection Act suffers from the exact same fatal pleading defects as each of the
 15 Plaintiff's other claims discussed herein. Plaintiff diatribe distraction fails to refute
 16 any of Defendants arguments in the Motion to Dismiss. As such it fails as a matter
 17 of law.

18 Nevertheless, to prevail on a Consumer Protection Act claim, a private
 19 plaintiff must plead facts demonstrating: (1) an unfair or deceptive act or practice,
 20 (2) that occurs in trade or commerce, (3) a public interest, (4) injury to the plaintiff
 21 in his or her business or property, and (5) a causal link between the unfair or
 22 deceptive act and the injury suffered. *See Ferguson v. Quinstreet, Inc.*, 2008 WL
 23 3166307, at *10 (W.D.Wash. Aug. 5, 2008) (citing *Indoor Billboard/Washington*,

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 25 Defendants'
 26 Reply to Plaintiff's Response
 27 & Objection to Rule 12 Motion

28 Robert W. Norman, Jr. (SBN 37094)
 29 Houser & Allison, APC
 30 9970 Research Drive
 31 Irvine, CA92618
 32 PH: (949) 679-1111
 33 FAX: (949) 679-1112

1 *Inc. v. Integra Telecom of Washington, Inc.*, 162 Wash.2d 59, 75, 170 P.3d 10
 2 (2007)).

3 Here, the Plaintiff has failed to clearly allege the necessary facts to allow
 4 Defendants to discern which Defendant committed what “unfair or deceptive act
 5 or practice”, if any; what the relevant public interest is; and what causal link exists
 6 between any such unfair or deceptive act and Plaintiff’s alleged injury.
 7 Accordingly, this Court should dismiss Plaintiff’s Consumer Protection Act claim
 8 against Defendants as a matter of law.

9 **J. Plaintiff’s Request For Injunctive Relief Should Also Be Denied**

10 Again, the causes of action alleged in the Plaintiff’s Complaint are not
 11 grounded in the law and are not supported by any discernable factual pleading. As
 12 a result, there are simply no grounds upon which this Court could reasonably
 13 conclude that the Plaintiff has even a “fair chance of success on the merits” on the
 14 underlying claims, and/or has raised any questions that are “serious enough to
 15 require litigation.” *Benda v. Grand Lodge of Intern. Ass’n of Machinists and*
Aerospace Workers, 584 F.2d 308, 315 (9th Cir. 1978). Because Plaintiff has
 16 failed to satisfy the threshold criteria to obtain the requested injunctive relief, the
 17 Court must deny the Plaintiff’s application for a preliminary injunctive relief as a
 18 matter of law.

20 **K. There Are No Facts To Support A Claim of Conspiracy**

21 The elements of conspiracy are: (1) an agreement (2) between at least two
 22 people (3) to commit an unlawful act by (3) lawful or unlawful means. *Bayha v.*
Lampson, 152 Wash.App. 1002 (Wash.App. 2009).

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This cause of action alleged in the Plaintiff's Response is not grounded in the law and is not supported by any discernable factual pleading. As such, Plaintiff's claim must be dismissed as a matter of law.

III. CONCLUSION

For each of the foregoing reasons, Defendants respectfully request that this Court enter an Order dismissing Plaintiff's Complaint in its entirety, and any further relief as this Court deems just and proper.

Dated: October 1, 2010

HOUSER & ALLISON
A Professional Corporation

/s/ Robert W. Norman, Jr.

Robert W. Norman, Jr.
Attorneys for Defendant,
OCWEN LOAN SERVICING, LLC
and MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC.

Defendants'
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& Objection to Rule 12 Motion

Robert W. Norman, Jr. (SBN 37094)
Houser & Allison, APC
9970 Research Drive
Irvine, CA92618
PH: (949) 679-1111
FAX: (949) 679-1112

DECLARATION OF SERVICE

The undersigned declares as follows:

On October 1, 2010, I served the foregoing document on the following individuals by U.S. Mail, Postage Prepaid:

Phimpa Thepvongsa
20044 139TH Way, SE
Kent, WA 98042

/s/Robert W. Norman
Robert W. Norman

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Robert W. Norman, Jr. (SBN 37094)
Houser & Allison, APC
9970 Research Drive
Irvine, CA92618
PH: (949) 679-1111
FAX: (949) 679-1112